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No. 190

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Docket No. 1086

METROPOLITAN BAG & PAPER DISTRIBUTORS ASSOCIATION, INC., YORKVILLE PAPER COMPANY, INC., A. E. MACADAM & CO., INC., JOHN H. FREE, INC., S. POSNER SONS, INC.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO FEDERAL TRADE COMMISSION'S BRIEF IN OPPOSITION

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The opposition brief of the Commission emphasizes the necessity for review. It deals with the questions presented by denying, or ignoring their existence, by begging the questions, or confusing the issues by semantics.

Thus, in stating the question presented, it ignores the four questions presented in the Petitioners' petition and erroneously states as the question before this Court the adequacy of the evidence.

Confusion results from the Commission's exercise in semantics, in misreading the opinion of the Court below regarding the National Association's coopera-

tion with regional price fixing efforts, as constituting a nation-wide conspiracy.

The issues, as thus sharpened, are common to many other cases of mass conspiracy brought by the Commission. These issues should be authoritatively resolved for the guidance of the Commission, and of the Court of Appeals, in dealing with charges against entire industries or trades.

Reply on the Issue of New Charges

The Commission implies, without clearly so asserting and without demonstration (Comm. Br. 7) that the complaint included a charge that one of the goals of the single national conspiracy charged, was "cooperating with regional efforts at price fixing". The heart of the complaint is Paragraph Eight (Pet. App. 196a-199a). Fairly construed, it does not put any respondent on notice to meet a charge either of (a) separate local or regional price fixing conspiracy, or (b) a single national conspiracy "to cooperate with regional price fixing efforts".

Only slight analysis is required to indicate that the goal ascribed as the single common understanding is vague and meaningless. If the National Association cooperated with only one region in price fixing efforts, the conspiracy thus charged would still be local, not national. The market areas and problems of the New York, Chicago, Pittsburgh, Wisconsin and the other numerous associations, differed widely (Pet. App. 4a-9a).

If the National Association cooperated with price fixing efforts in several regions, the conspiracies would still be separate and local, although executed through a common key figure,—the precise situation presented in *Kotteakos v. United States*, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557. No common understanding would link merchants in New York with those in Chicago, Pittsburgh or elsewhere.

Such a situation cannot be transformed into a single national conspiracy by ascribing a motive, intent, purpose or "goal" to the National Association of assisting several regional price fixing efforts, or of price fixing in general. Such a "National" goal does not make a national, or nation-wide goal. This is playing with words.

It is tortuous reasoning to claim that the cooperation of the National Association in regional price fixing efforts in 1934 subjects the members of any regional association, which joined the National Association at some time not shown in the record, to a charge that they became participants in the National Association's "goal", adopted at some later date, to assist the region's wrongful activities. This stands the alleged conspiracy on its head.

Nor can the wicked motives ascribed to the National Association convert regional efforts into a common understanding among the various regions. To be unlawful, there must be a conspiracy to do something, not merely to harbor evil thoughts. Otherwise numerous unrelated industries or trades could be charged together with a single conspiracy because they were all linked by a similar iniquitous motive.

Where a single major conspiracy was charged, this Court has dismissed a bill in equity for an injunction on the ground of multifariousness, as to persons involved in a minor local conspiracy, *United States* v. *Reading Co.*, 226 U. S. 324, 57 L. Ed. 243, 33 S. Ct. 90.

The Commission now attempts (Comm. Br. 7) to dispose of the "regional conspiracy" referred to by the Court below as "merely a shorthand phrase". But it still relies on the new charge formulated by the Court below, and not presented in the complaint or in the proceedings, that these Petitioners joined a single nation-wide conspiracy by joining a National association whose "goal" was to "cooperate with regional efforts at price fixing" at an earlier time.

Reply on the Issue of New Findings

The Commission deals with this question by attempting to relate the alleged earlier regional conspiracy ambiguously either (1) to the new charge of an imputed goal to the National Association of cooperating with this regional conspiracy discussed above, or (2) to a "National conspiracy 'spearheaded by National' to fix prices in the entire industry" (Comm. Br. 7).

The latter charge, based on the use of the Brown Book, for wrapping paper, first issued in 1948, concededly does not apply to these petitioners, who never used this "Brown Book". The Commission has misread the opinion of the Court below, which referred to a regional conspiracy in 1934, 1935, or 1941, 1942 (during the period of NRA or OPA controls) and

the National Association's use in 1948 of price books, as "delayed parallel action" and therefore as not probative (Pet. for Cert. 31, 32).

The new findings of a regional conspiracy now complained of, are either related, without basis, to the new charge discussed above, or are themselves made the basis of a separate charge of local conspiracy, neither of which was previously presented as an issue.

The Commission has seen fit (Comm. Br. 9) to list numerous exhibits not relevant to the issues before this Court, which might reflect an alleged regional conspiracy in the 1930's. Most of them are Minutes of other Associations and constitute declarations of alleged co-conspirators. It might be noted that if these respondents had been themselves confronted merely with a charge of a regional conspiracy, proof would have first been required of their having become participants in such a conspiracy, before these declarations could have been deemed admissible against them.

The Commission itself, as previously noted, had neither drawn the inference, nor made the findings which the Court below ascribed to it (Pet. for Cert. 28, 29), such as that "the regional council created in 1940 continued in existence until the filing of the complaint" (1948); or that its members knew of National's purposes, most of which the complaint itself (Pet. App. 191a) set forth as worthy and legal.

Reply on the Issue of Separate Local Conspiracies

The Court below itself referred to these petitioners as "operating somewhat on the periphery" (Pet. for Cert. 27). Actually, both the Commission and the Court below strayed widely beyond the group which has been found to have entered into a nation-wide conspiracy, to charge these petitioners as participants for wholly unrelated activities.

The lack of any relationship between the alleged local conspiracy of 1934 and the single national conspiracy of 1948, brings this case squarely within the principles of *Kotteakos* v. *United States*, 328 U. S. 750.

Reply on the Issue of Membership as Probative

The Commission concedes the principle that membership alone in a trade association would not be sufficient (Comm. Br. 7, 8). However, it cites *Federal Trade Commission* v. *Cement Institute*, 383 U. S. 683, as applicable. The common practices found sufficient there, however, to link firms to a nation-wide conspiracy, unlike here, were based on the finding of (1) "That the Institute was organized to maintain the Multiple Basing Point System", and (2) "that the delivered prices . . . were . . . identical with the delivered prices of all their competitors", *Cement Institute*, 333 U. S. 719, 68 S. Ct. 812. In the case at bar, there are no such findings.

The equivalent in this case would be, if that were so, the petitioners' common adherence to the Brown

Book. Without this, we are left with the naked fact of membership or the holding of some minor office.

Conclusion

The combination of charges and findings in this case, disappears before the simple question "With whom and when, did these petitioners agree to do what?". This entire proceeding resembles the bed of Procrustes, supervised by the Commission. If particular respondents do not fit in the category of using price books, they are made to fit on the bed of guilt, by elongation of their limbs, by new charges or new findings.

The result obtained by the Commission is made possible only by an abuse of the doctrine of conspiracy, and by ignoring rules of evidence prevailing, not in courts of law, but among average men, and by a finding, as Commissioner Lowell Mason stated, of "guilt by trade association" (Pet. App. 74a-78a), making "an Abilene, Texas, paper dealer blood brother conspirator with one in Hickory, North Carolina, and ensnares them both to a Nekoosa, Wisconsin merchant, in a joint, common cause of action with a Bensonville, Illinois dealer".

Respectfully submitted,

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Dated: August 14, 1957.